IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD WAYNE BUTLER, Appellant.	No. 37653-9-II UNPUBLISHED OPINION

Houghton, P.J. — Richard Butler appeals his conviction for failure to register as a sex offender. He argues the trial court erred when it admitted evidence of his failure to register in the past; defense counsel rendered ineffective assistance when he failed to request a limiting instruction; and the trial court lacked the statutory authority to order him to pay restitution for medical treatment that Clallam County provided during his incarceration. We affirm the conviction but vacate the restitution order and remand.

FACTS

On February 14, 1997, a jury convicted Butler of third degree rape of a child. Between October 3, 2006, and October 17, 2006, he did not register with the sheriff's office as required under RCW 9A.44.130. He had failed to register four times in the past. Before he failed to register, he lived on the beach, registered weekly as a homeless sex offender, and attended classes at a local community college.

The State moved in limine to allow cross-examination of Butler's criminal history for purposes of impeachment. The trial court granted the State's motion and allowed limited the use of the convictions for impeachment purposes.

At trial, Butler testified that he did not register as a sex offender because a group of men chased him out of town. He testified that the men approached him outside of class, attacked him, and threatened to kill him if he did not leave town. When he went back to the beach to reclaim his tent and belongings, he found them missing or destroyed. As he left the beach, men from the encounter at the college chased him, firing a .22 caliber revolver at him twice, missing both times. Butler testified that after the incident he left town and hid out in the woods for six months, afraid to tell law enforcement what had happened because he did not think anyone would believe a sex offender.[1]

During cross and redirect, Butler answered questions about his prior failures to register as a sex offender. For example, defense counsel asked about Butler's four previous convictions for failure to register in 2001, 2002, 2004, and 2005. Butler explained that he pleaded guilty to all four instances and was unable to register because of threats against him.[2]

The jury found Butler guilty as charged. The trial court sentenced him to 50 months and declined to impose the fine, attorney fees, or jury fees due to his indigency. However, the trial court did order restitution for medical expenses he incurred during his incarceration. He appeals.

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[1] On cross, he admitted that did not live alone in the woods exclusively and had friends in the area.

[2] Outside the presence of the jury, the State conceded that Butler had met the requirements to instruct the jury on necessity, and the court agreed to include the instruction.

ANALYSIS

Admission of Prior Convictions

Butler first contends the trial court improperly admitted evidence of his prior convictions for failure to register as a sex offender. He argues that the trial court improperly allowed the State to impeach him about the prior offenses without weighing the factors required under ER 609(a). The State responds that although the trial court did not discuss the factors, any possible error is harmless due to the overwhelming evidence he failed to register.

Under *State v. Alexis*, a trial court weighs "(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime." 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Reviewing the record, it is apparent that the trial court did not weigh each of the *Alexis* factors, although it did discuss credibility, probative value versus prejudicial effect, and relevance. The trial court erred by not weighing all the *Alexis* factors. 95 Wn.2d at 19.

We review errors under ER 609(a) under the non-constitutional harmless error standard. *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). An error under ER 609(a) is not reversible unless we determine with reasonable probability that but for the error, the outcome of trial would have differed. *Calegar*, 133 Wn.2d at 727.

Here, Butler and his trial counsel admitted from the outset of trial that he committed the crime and focused entirely on his necessity defense. Thus, the proper question in this case is whether it is reasonably probable that the jury would have found Butler not guilty by reason of

necessity had the trial court barred testimony of his prior convictions.

Butler has not presented a persuasive argument that it would. First, he testified that several men attacked him, destroyed his belongings, chased him with a gun, shot at him twice, left him unconscious, and that he found one of their teeth on the ground near him, yet he did not report any of these events to the police. Second, he stated three times that no one would believe his version of events because he is a sex offender. We recognize that it is the jury's province to weigh the credibility of witnesses and, given the facts in this case, it is not reasonably probable that the outcome of trial would have differed had the court weighed the ER 609(a) factors. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *see Alexis*, 95 Wn.2d at 19. Therefore any error resulting from the trial court's failure to properly weigh the ER 609(a) factors was harmless.[3]

Ineffective Assistance

Butler next contends that his counsel rendered ineffective assistance when he failed to request a limiting instruction with respect to Butler's previous convictions for failure to register as a sex offender. The State counters that the decision was tactical.

A claim of ineffective assistance of counsel requires a showing of deficient performance by counsel and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Legitimate trial tactics and strategy are no basis for an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

[3] Furthermore, Butler testified that he had previously pleaded guilty when he had not registered, but this time he testified that he had not registered because of the threats so he had not pleaded guilty and had exercised his right to trial. The admission of his prior plea-based convictions, therefore, arguably tended to support rather than undermine his necessity defense.

Butler must overcome a strong presumption that his counsel's performance was not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Butler testified that he did not register and knew the law required him to do so. Throughout trial, his defense centered on his necessity argument, and his counsel made the tactical decision not to focus the jury's attention on any other matters. Had the court instructed the jury that it was not to consider his previous convictions as evidence of guilt, that would have done nothing to further his defense because he had already admitted the crime. Because his counsel's performance was not deficient, we do not address the prejudice prong. *Hendrickson*, 129 Wn.2d at 78. Butler's argument fails.

Restitution

Butler finally contends that the trial court lacked the statutory authority to order him to pay restitution to the Clallam County Jail for the medical care it provided during his incarceration. The State responds that chapter 70.48 RCW[4] allows the trial court to collect these fees. The State is correct that under RCW 70.48.130,[5] "the courts are authorized to order defendants to repay all or part of the medical costs incurred by the governing unit or provider during confinement."

[4] The 2007 amendments to RCW 70.48.130 do not apply because the law in effect during the time of the crime governs Butler's sentence and, here, the offense occurred in October 2006. RCW 9.94A.345. Furthermore, RCW 70.48.130 is effective until June 30, 2009.

[5] Under RCW 70.48.130, in certain circumstances a county may recover from the Department of Social and Health Services (DSHS) the cost of necessary or emergency medical services it provides to confined persons. A county may recover from the confined person those expenses not recovered from DSHS or it may bill the confined person's insurance. RCW 70.48.130. However, such a repayment order would not be a restitution award; it would be a legal financial obligation. RCW 9.94A.760.

However, RCW 70.48.130 is not a restitution statute and does not provide a basis for the State's argument in support of the trial court's restitution award. *Cf.* RCW 9.94A.753. We vacate restitution awards when no causal connection between the defendant's crime and the injuries inflicted exist. *State v. Dennis*, 101 Wn. App. 223, 229, 6 P.3d 1173 (2000). Under RCW 9.94A.753(3), restitution "shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." Restitution payments have priority over other legal financial obligations such as fines, costs, and assessments. RCW 9.94A.760(1).

Here, the trial court ordered restitution of $832.65 to the Clallam County Jail for Butler's medical expenses without showing any causal connection between his crime of failure to register as a sex offender and the expenses Clallam County incurred for his medical treatment. The State did not establish a causal connection, and the restitution award does not fall under the categories set forth in RCW 9.94A.753(3). Therefore, we remand to the trial court with instructions to amend Butler's judgment and sentence to reflect that his medical treatment is a legal financial obligation.

The conviction is affirmed, and the restitution order is vacated and the matter remanded for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.